UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A.W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WATKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village of Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Civil Action No.
06 CIV 3755 (CM)

Defendants.

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DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Preliminary Statement

Plaintiff Buffalo Southern Railroad, Inc. ("BSOR") is attempting to perpetrate a hoax on this Court. It submitted papers indicating that it has an ongoing rail operation in Croton-on-Hudson, which the Village is attempting to disrupt. In fact:

- There are currently no rail operations at all over the 1,600-foot track at 1A Croton Point Avenue (the "Site"), so far as the Village has been able to observe.
- In order for rail cars to enter or leave the Site, BSOR would need an interchange agreement with CSX Transportation, Inc. to switch cars to CSX trains operating over the main line through Croton-on-Hudson. BSOR has no such agreement.
- In order to operate as a common carrier on the Site, as BSOR seeks to do, BSOR would need approval from the Surface Transportation Board ("STB"). BSOR has not applied for, much less obtained, such approval.
- The Village, until being told that it was being sued and should appear in court the next morning for a TRO hearing, had never heard of BSOR, much less attempted to enforce laws against it.

A solid waste transfer station at the Site was shut down in 2005 after the New York Court of Appeals upheld the Village's finding that its operators were repeatedly and intentionally violating the environmental laws. The Site's owner, Greentree Realty, has since made numerous attempts to resume a flow of rent payments from someone. It asked the New York Supreme Court, Westchester County, to find that the Village had no permitting authority over the Site, but Justice Nicolai rejected this claim and ruled that a special permit was needed from the Village. No application for this permit has been filed. Then Greentree apparently consented to the sale of

its lessee's leasehold to another entity, a solid waste company misleadingly named the Northeast Interchange Railway ("NIR"). NIR filed a notice of exemption with the STB claiming it needed no further approvals. The STB rejected this notice, and directed NIR to file either a petition for exemption or a formal application to operate over the track as a common carrier. No such petition or application has been filed.

Greentree and NIR would rather file emergency applications to various courts than file required applications with the relevant government agencies. Thus NIR's affiliate RS Acquisition Co., LLC ("RSA") has entered into a short-term sublease with BSOR, which is now attempting an end-run around the rulings of both Justice Nicolai and the STB.

BSOR does not have a railroad operation in Croton-on-Hudson. It merely aspires to start one. It speculates that it will be able to obtain an agreement with CSX for interchange of rail cars, and that the STB will allow it to operate as desired. That is hardly enough to obtain a preliminary injunction to preempt state and local law, especially against a municipality's exercise of its traditional police and eminent domain powers.

Factual Background

The factual background is detailed in the accompanying affidavit of Marianne Stecich ("Stecich Aff.") and its exhibits. The following highlights the most important facts.

The approximately ten-acre parcel at the Site has been used for various materials handling operations for many years. From 2000 through the summer of 2005, Greentree Realty leased it to Metro Enviro Transfer, LLC for use as a construction and demolition ("C&D") debris transfer station. This company accumulated an appalling compliance record, and in July 2005 the New York Court of Appeals upheld the Village's 2003 decision to shut it down. *Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson*, 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005).

Now that Metro Enviro Transfer, LLC could no longer operate at the site, Greentree granted a lease to an entity that it thought could -- NIR. Litigation ensued among the Village, Greentree and NIR. On April 25, 2006, Justice Nicolai issued a preliminary injunction barring NIR and its affiliate RSA from operating a waste transfer station at the Site without first obtaining a special permit from the Village. He ruled that "the Village has the right to impose conditions necessary to prevent harm to the community and the environment." *Village of Croton-on-Hudson v. Northeast Interchange Railway, LLC,* Index No. 22176/05 (N.Y. Sup.Ct., Westchester Co., April 25, 2006) (Stecich Aff. Ex. 9).

Since the mid-1980s the Village had been looking, without success, for a new site for its public works facility, where road and sewer maintenance trucks, salt and sand piles, and other such items are kept. It now consumes land at the Croton-Harmon railroad station that could be used for commuter parking. The Village held a public hearing on February 6, 2006 on the possibility of taking the Site by eminent domain so that it could build the public works facility there. The Village also began work on an environmental impact statement so that it could reach an informed decision on the proposal.

Meanwhile, NIR filed with the STB on August 1, 2005 a Notice of Exempt Transaction under the STB's expedited "summary class exemption procedures," stating that it planned to become a common carrier by rail and to lease and operate its 1,600-foot "rail line"[1] for the transloading of C&D waste and other materials (Stecich Aff. Ex. 5). Describing its track as a "rail line," NIR thus determined that it needed STB approval. As explained below, STB

[1] NIR explained that "its entire rail line will initially consist of the 1,600 foot track" and that it "expects to enter into an interchange agreement with CSX, as well as other commercial arrangements with CSX and other rail carriers, in order to handle both existing and new rail traffic to and from the line of NIR." Verified Notice of Exempt Transaction (filed Aug. 1, 2005) at 3.

approval is required to lease and operate as a common carrier over a "rail line," whether the applicant seeks to become a common carrier or is already a common carrier over other rail lines. The Village demonstrated that NIR had not shown it was practically or legally able to transform the 1,600-foot private spur track at issue into a rail line operated by a common carrier. *Petition of the Village of Croton-on-Hudson to Reject Notice of Exemption or, in the Alternative, for Stay of Effectiveness,* F.D. No. 34734 (filed Aug. 4, 2005) at 7-8. The STB, noting that this was not a "routine transaction" because "NIR has expressed an intent to convert this previously private construction waste transfer operation into what could turn out to be a more extensive for-hire common carrier operation involving commodities in addition to construction waste," rejected the notice and ruled that NIR would have to make a full filing with the STB. (Stecich Aff. Ex. 7).

Thus two tribunals -- the New York State Supreme Court and the STB -- have ruled that NIR must file applications in order to operate at the Site.

The Village expected to see these applications, but never did. Instead, late the afternoon of May 16, 2006, the Village Attorney received a call, and shortly thereafter a fax, from counsel for BSOR (the same lawyer who had been representing NIR and RSA) informing her of the instant lawsuit, and of the temporary restraining order hearing to be held the next morning.

Prior to this telephone call, no Village official had ever heard of BSOR. (Stecich Aff. ¶ 5) The faxed papers revealed that RSA had entered into a two-year lease with BSOR, and that BSOR was claiming that Village authority over the site had been preempted by the Interstate Commerce Commission Termination Act ("ICCTA") of 1995, 49 U.S.C. §§ 10101 *et seq.*

This Court issued a temporary restraining order in a brief hearing on May 17, and scheduled argument of BSOR's preliminary injunction motion for May 26, 2006.

BSOR's Deceptions

Into a relatively compact set of papers, BSOR has packed a remarkably long set of misleading and deceptive statements. We will list seven.

Deception 1: Claim That BSOR is Currently Operating on the Site

BSOR's papers repeatedly claim that the company is currently operating a transload facility on the Site, and they imply that these operations have been going on for some time. E.g., Complaint ¶21 ("BSOR leases and provides rail transportation service at ... 1A Croton Point Avenue"); Memorandum of Law at 1 (same); Complaint ¶ 29 ("BSOR's rail transportation operations at the BSOR Croton Yard provide coordination between rail carriers and motor carriers"); Feasley Aff. ¶12 (same); Feasley Aff. ¶ 20 ("condemnation of the Property would cease BSOR's rail transportation activities in Westchester County"); Memorandum of Law at 20 ("The BSOR Croton Yard is used to transfer commodities and/or containers of cargo ... Further, BSORs services related to that movement include 'receipt, delivery, ... storage, handling, and interchange of ... property.'"). Additionally, BSOR's papers include an affidavit from Joseph Rutigliano of Coastal Distribution LLC, who writes (¶8), "BSOR is beginning to provide such service to Coastal." (Coastal Distribution LLC also operates C&D waste facilities.) This sentence (repeated in the complaint, ¶36, the Memorandum of Law at 9 and 18, and in Feasley Aff. ¶25) has an ambiguous tense, and appears to be a way of concealing true state of affairs.

This depiction of an established operation is shown to be untrue by the accompanying affidavit of Charles A. Kane, a Supervisor of Metro North Commuter Railroad, who works at the Harmon Shop directly across the tracks from the Site. From his workplace Mr. Kane has a clear view of the property and its 1600-foot track, and (as a Village Trustee who is keenly interested in

what happens on the Site) he pays close attention to what happens there. His affidavit states that between the closure of the Metro Enviro facility in the summer of 2005 and the time the BSOR lawsuit was filed, "I have not seen any train cars at all on the 1600 foot piece of railroad track. I have not seen train cars coming onto the track nor departing from the track. In addition, during that same period, I have not seen any trucks coming onto or leaving 1A Croton Point Avenue." He adds that, "[s]ince Metro Enviro left the site, I have not seen any activity at all at the site, other than, on a daily basis, a single automobile parked at the weigh station gate and one person, who appears to be guarding the site."

For operations to escape Mr. Kane's observation, CSX trains would have to deliver rail cars carrying materials to the property at night after he leaves work, other CSX trains would have to pick up the empty rail cars later the same night, and trucks would have to pick up the unloaded materials the same night. This scenario is utterly implausible.

Deception 2: Claim That BSOR is Publicly Offering Service at the Site

BSOR's papers say, "Now, BSOR holds itself out to the public generally to provide common carrier service at the BSOR Croton Yard." Complaint ¶ 28; Feasley Aff. ¶ 11. Plaintiff's Application for a TRO (¶3) states, "Since March 2006, BSOR has held itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard."

The deception here begins with the terminology "BSOR Croton Yard." There is no sign visible anywhere with that name. Since the recent removal of the Metro Enviro Transfer sign, there has been no sign at all at the Site. (Stecich Aff. ¶ 3) No Village official had ever heard Plaintiff's name or of anything called "BSOR Croton Yard" before the lawsuit arrived. (Stecich Aff. ¶ 5) No advertisements, notices, or other evidence of this name have been found, except for BSOR's own web site.

That web site is very telling. The home page (members.aol/com/buffalosouthern/) speaks exclusively of operations in the Buffalo area. However, it has a link to a page of announcements, and the first announcement -- dated May 17, 2006 -- states, "The BSOR announces that they are now offering common carrier transportation services at its new Transload Facility in Croton-on-Hudson, New York. This facility serves Westchester County and New York City markets." (Stecich Aff. Ex. 1)

May 17 is the day after the Village was told of the instant lawsuit, and the day that BSOR came to this Court for a TRO.

In a similar bit of linguistic legerdemain, BSOR's papers refer to a building on the Site as the "Transload Facilty." Complaint ¶ 23. This is the structure where Metro Enviro Transfer processed C&D debris being transferred from trucks onto rail cars; before the lawsuit was filed, it had never been known as the "Transload Facility." Indeed, the site plan that BSOR's Albert Feasley attached to his affidavit as Exhibit A labeled it "Processing Building."

Deception 3: *Claim That BSOR Interchanges Traffic With CSX Tracks*

BSOR's complaint states, at ¶22, that its 1,600 feet of track "connects with the Hudson line of CSX Transportation, Inc." Similarly, Feasley Aff. ¶¶5, 11, 12. However, while there is a physical connection between this 1,600-foot track and the Hudson line, there is presently no legal interchange between BSOR and CSX at Croton-on-Hudson. CSX was apparently providing rail service to Metro Enviro Transfer over the Hudson line in a carrier-shipper relationship. But, as explained in the accompanying affidavit of Louis Gitomer, a former high official of the Interstate Commerce Commission (STB's predecessor), BSOR seeks a carrier-carrier relationship with CSX (Gitomer Aff. ¶¶15-20). Rail cars are transferred between carriers at points of interchange pursuant to interchange agreements. The only published point of interchange between CSX and

BSOR is near Buffalo, New York. Before BSOR can offer common carrier services to and from its "BSOR Croton Yard," it must enter into an interchange agreement with CSX for that new point of interchange and notify the Association of American Railroads to publish notice in "Rail Link," a database maintained for the industry. BSOR has not explained how it could interchange traffic with CSX at its "BSOR Croton Yard" without an interchange agreement with CSX and/or providing notice through Rail Link. Absent the right to interchange with CSX, all BSOR can do is push rail cars back and forth uselessly on its 1,600 feet of track. BSOR has given no evidence that it is likely to achieve an agreement with CSX.

Deception 4: Claim That BSOR Does Not Need STB Approval

As explained in detail below under Point I of the Argument, BSOR in fact requires STB approval before it may begin operating in Croton-on-Hudson.

BSOR does its best to avoid mention of what it must or must not do with the STB. However, in its Memorandum of Law, page 17, tucked into the fine print of Footnote 9, is this statement: "BSOR did not require STB approval to begin rail transportation operations at the BSOR Croton Yard. This is because, under the ICCTA, the STB 'does not have authority' over 'construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.' 49 U.S.C. § 10906. Given the BSOR Croton Yard's characteristics, it comes within this statutory provision."

This footnote wildly misstates the law. As shown by the Affidavit of Louis Gitomer, he 1,600 foot length of track in Croton-on-Hudson is not governed by § 10906, and BSOR must obtain approval or exemption from the STB before it may operate as a common carrier from Croton-on-Hudson. As noted above, the STB has already ruled that NIR must file an application of some sort before it may operate the Site. BSOR cannot circumvent this requirement by

obtaining at two-year lease from NIR's affiliate RSA. Operation without the necessary STB authorization subjects BSOR to a fine of $5,000 per day of violation. 49 U.S.C. §11901.

Deception 5: Claim That the Village Is Taking Enforcement Action Against BSOR

Complaint ¶56 states, "A controversy has arisen between the parties concerning the application of certain laws to and enforcement of such laws against BSOR in connection with its rail transportation operations at the BSOR Croton Yard." Complaint ¶68 states, "Enforcement of [the Village's] statutes and provisions with respect to BSOR's rail transportation operations at the Property impose on BSOR significant economic and operational burdens that are both unnecessary and unwarranted." The complaint's Prayer for Relief seeks:

> b. a declaration that the Village Defendants ... are without authority or jurisdiction in, and preempted from, applying or enforcing against BSOR any laws ... that seek or purport to regulate ... the activities ... occurring at the BSOR Croton Yard,
> c. a declaration that all of the Village Defendants' efforts to do so heretofore are null and void,
> d. a declaration that the Village Defendants' application and enforcement against BSOR of the above laws ... at the BSOR Croton Yard is unconstitutional, and
> e. a declaration that the Village Defendants' application and enforcement against BSOR of the above laws ... is in violation of 42 U.S.C. §1983.

It came as a great surprise to the Village to be sued for taking enforcement action against BSOR, because, until the lawsuit, the Village had never heard of BSOR, and was not taking enforcement action against it. Stecich Aff. ¶ 5. The Village has stated that a *solid waste* facility requires Village permits (and Justice Nicolai agreed), but prior to the instant litigation the Village has not taken any action to inhibit a rail transfer operation for non-waste goods at the Site.

The Village had begun exploration of acquiring the Site for use as a public works facility. Had BSOR picked up the phone and called the Village before suing, it might have asked whether it would be possible to reach an accommodation whereby part of the Site might be used for the

public works facility and part for rail operations. Such discussions might still be worthwhile (notwithstanding the fact that BSOR got its relationship with the Village off to a difficult start by introducing itself through a lawsuit).

Deception 6: Claim That Village Approval Would Be Very Time-Consuming

Complaint ¶7 states that "application of the Village's zoning and land use provisions would unduly interfere with interstate commerce by giving the Village the ability to deny BSOR the right to conduct operations and would be time consuming, allowing the Village to delay or interfere with BSOR's rail transportation activities almost indefinitely. As a result, BSOR was forced to commence this action seeking declaratory and injunctive relief against the Village."

There is no basis for this assertion. The best indication of how long it would take the Village to process a BSOR permit application -- should one ever arrive -- is the handling of a special permit needed for the expansion of the Max Finkelstein Tire Warehouse on a parcel just north of the Site. The permit application was filed on November 12, 2002, and granted by the Village Board on January 21, 2003 (Stecich Aff. Ex. 12) -- hardly an unreasonable delay.

Deception 7: Claim That Denying Injunction Would Have Negative Environmental Impact

Complaint ¶31 declares that "without this important rail link at the BSOR Croton Yard, the already overburdened roads in Westchester County will be further inundated with even more long-haul truck traffic." Similarly, Feasley Aff. ¶14.

Of course, BSOR has contributed nothing to alleviating traffic congestion in Westchester County because it is not operating. However, were it to operate, it might transfer some freight traffic from truck to rail, which could have a positive environmental impact statewide, but a negative impact locally because of the additional truck traffic. If the public works facility is built

at the Site, so that the space it now occupies can be converted to commuter parking, many people who now drive to work could instead take Metro North. Without a full analysis it is not possible to assess the environmental effects. The environmental impact statement now being prepared will study this. BSOR had no basis for claiming that its facility would be better for the environment than using the Site for public works purposes.

ARGUMENT

POINT I

ICCTA Does Not Preempt Village Action

The STB has jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a)(1), and ICCTA preempts state and local "regulation" of rail transportation, 49 U.S.C. § 10501(b). However, not every state or local law that incidentally touches upon rail transportation is preempted. ICCTA preemption "does not reach local regulation of activities not integrally related to rail service." *CFNR Operating Co. v. City of American Canyon*, 282 F.Supp.2d 1114, 1118 (N.D. Cal. 2003) (refusing to strike down a municipal resolution that "is in the nature of a generally applicable exercise of the City's police powers to safeguard the health and safety of its citizens").

Innumerable facilities throughout the country with rail service are routinely subjected to state and local regulation. That includes shippers (those who send materials by rail) and consignees (those who receive materials by rail). ICCTA preemption is not routinely asserted because regulation of shippers and consignees is not regulation of "transportation by rail carrier." Rather, these facilities involve "transportation '*to* rail carrier.'" *High Tech Tran., LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004) (citation omitted) (emphasis in original); *see also J.P. Rail, Inc. v. N.J. Pinelands Commission*, 404 F.Supp.2d 636, 650-52 (D.N.J. 2005). Otherwise,

"any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier," 382 F.3d at 309, a proposition the Third Circuit could not accept. Metro Enviro Transfer never suggested that ICCTA preemption had any relevance to the Village's regulation of the C&D transfer station, even though waste left the Site by rail.

In its enactment of the ICCTA in 1995, Congress granted the STB exclusive *jurisdiction* over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State," 49 U.S.C. § 10501(b)(2), while limiting STB *authority* over the construction, acquisition, operation, abandonment, or discontinuance of these tracks, 49 U.S.C. § 10906 (Gitomer Aff. §8). But the mere fact that a freight shipper's or receiver's facility is served through a "spur, industrial, team, switching, or side track[]," as they almost always are (the alternative being to unload a car while it is stopped on a main line), does not alter the scope of ICCTA preemption. *Id.* Through July 2005, the spur track used by the shipper on the Greentree facility, Metro Enviro Transfer, was not viewed by anyone as having any bearing on the Village's exercise of police power over the waste processing operations on the property.

With the New York Court of Appeals' ruling adverse to Metro Enviro Transfer in July 2005, Greentree grasped for ICCTA preemption as its lifesaver. It realized that to do so, it needed to introduce a "rail carrier" into the picture. One approach might have been to contract with CSX, the rail carrier serving the facility, to operate a transload facility on behalf of CSX.[2]

[2] While not endorsing the decision in *Coastal Distrib., LLC v. Town of Babylon*, No. 05-CV-2032, 2006 U.S. Dist. LEXIS 8400 (E.D.N.Y. Jan. 31, 2006), the Village notes that this approach worked for Coastal Distribution, LLC (which appears in this proceeding as a freight receiver) in Babylon where it entered into a contract with the New York and Atlantic Railway Company ("NYA") to operate a transload facility along the NYA's line. In *Green Mountain R.R. Corp. v.*

Footnote continued on next page

But instead, NIR was created, purportedly to serve as an independent common carrier by rail over the 1,600-foot track. NIR advised the STB in its Notice of Exempt Transaction, filed August 1, 2005, that it planned to transform this spur, which had served only one shipper, into a "line of rail" available to many shippers (Stecich Aff. Ex. 5). NIR correctly recognized that both the creation of a common carrier by rail and the transformation in a track's use from spur track to line of rail requires STB approval. As explained above, the STB concluded that the expedited procedure NIR had invoked was not appropriate where, as here, there are intertwined questions about whether NIR would assume the rights and obligations of a common carrier, and the spur track would be converted into a line of rail (Stecich Aff. Ex. 7). The STB, therefore, directed NIR to file a more detailed petition for exemption or a formal application. If the STB ultimately concluded that NIR would in fact be acting as a bona fide common carrier over a line of rail, ICCTA preemption would come into play. But the scope of ICCTA preemption would have to be determined, and the STB has broad authority to impose its own conditions (environmental and otherwise) when it grants operating licenses.

Presumably, the specter of STB-imposed conditions caused NIR to question its strategy of seeking STB approval. Now NIR had to come up with an end-run around the STB. Enter BSOR. NIR's counsel has embarked on a *completely novel* strategy for attempting to convert a noncarrier's facility with a spur track – as to which there is plainly no ICCTA preemption – into a facility as to which there is at least some argument in favor of ICCTA preemption: bring in an authorized common carrier with a rail line hundreds of miles away to operate over the track. But this stratagem has a fatal flaw. While BSOR could commence operations over a spur track from

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Vermont, 404 F.3d 638 (2d Cir.), *cert. denied*, 126 S. Ct. 547 (2005), on which BSOR relies, the railroad owning the line of rail itself owned and operated the transload facility.

its already authorized rail line in the Buffalo area without STB approval, it cannot enter a new territory served by another carrier (CSX) and justify its operations as "spur" operations. While the 1,600-foot track at issue was a "spur" with respect to CSX's rail line, it is not a "spur" with respect to BSOR's rail line in Buffalo. BSOR could provide private switching services to the owner/lessee of the property at issue without STB approval, but that would constitute transportation *to* a rail carrier (CSX) and not transportation *by* a rail carrier (even though BSOR acts as a rail carrier in another context). Only by operating as a common carrier can ICCTA preemption be triggered, but that operation then would convert the spur into a "line of rail," which can only be done with Board approval. BSOR cannot have it both ways.

BSOR cannot contend that ICCTA preempts Village police and eminent domain powers, since it is illegally holding itself out as a common carrier. ICCTA provides that BSOR can extend its operations only with STB approval. 49 U.S.C. §10901 provides:

> "(a) *A person may* --
> (1) construct an extension to any of its railroad lines;
> (2) construct an additional railroad line;
> (3) *provide transportation over*, or by means of, an extended or *additional railroad line*; or
> (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,
> *only if the Board issues a certificate* authorizing such activity under subsection (c)."
>
> Similarly, 49 U.S.C. § 10902 states:
>
> "(a) A Class II or *Class III rail carrier* providing transportation subject to the jurisdiction of the Board under this part *may acquire or operate* an extended or *additional rail line* under this section *only if the Board issues a certificate* authorizing such activity under subsection (c).
> (b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice of the beginning of such proceeding."

Note that Complaint ¶3 and Feasley Aff. ¶ 2 state that BSOR is a Class III rail carrier.

BSOR's existing operations are entirely in the Buffalo area. The track in Croton-on-Hudson would thus be an "additional" rail line needing STB approval. The only case relied upon by BSOR in its footnote 9, where it asserts that no STB approval is required because the 1,600-foot track is a "spur," is *United Transportation Union-Illinois Legislative Board v. Surface Transportation Board*, 183 F.3d 606 (7th Cir. 1999). In that case, however, the court explained that, under the test of *Nicholson v. Interstate Commerce Comm'n*, 711 F.2d 364, 367 (D.C. Cir. 1983), "track is railroad line if it extends into new territory not served by the carrier or already served by another carrier." *Id.* at 613. The court affirmed the STB's decision that one of the tracks at issue – the beer track – was properly classified as a "railroad line" based on its current proposed use even though the former carrier had used it as a siding. *Id.*

The Village submits that this Court should refer the question whether BSOR must obtain STB approval to conduct the operations it proposes to conduct to the STB for its determination. If the STB concludes that BSOR needs its approval, that ends this matter unless and until BSOR seeks and obtains that approval from the STB. The Village also respectfully requests that this Court include in its reference to the STB the question of the scope of any ICCTA preemption in the circumstances presented here. BSOR should not object to this reference. *See* its Memorandum of Law at 19 n.11 ("Since the STB is the agency charged by Congress with administering the ICCTA, its opinion concerning the scope of preemption provided by Section 10501(b) is entitled to great weight.")

Preemption is not automatic. To the contrary, "'Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224 (1993) (quoting *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981)).

In rejecting a claim that ICCTA preempted local zoning control over a railroad, the Eleventh Circuit declared:

> Express pre-emption applies only to state laws "with respect to *regulation* of rail transportation." 49 U.S.C. § 10501(b) (emphasis added). This necessarily means something qualitatively different from laws "with respect to rail transportation.".. .Congress narrowly tailored the ICCTA pre-emption provision to displace only "regulation," i.e., those state laws that may reasonably be said to have the effect of "manag[ing]" or "govern[ing]" rail transportation, Black's Law Dictionary 1286 (6th ed. 1990), while permitting the continued application of laws having a more remote or incidental effect on rail transportation....[E]xisting zoning ordinances of general applicability, which are enforced against a private entity leasing property from a railroad for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws "with respect to regulation of rail transportation."

Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001) (citations omitted). A "preemption analysis should be "tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.'" *High Tech*, 382 F.3d at 302, citing *Merrill Lynch v. Ware*, 414 US 117, 127 (1973).

BSOR cites numerous cases upholding ICCTA preemption of state and local regulation over railroads. But ICCTA preemption is a very fact-specific inquiry, and all of the cited cases presented very different factual circumstances. *See, e.g., Maumee & Western R.R. Corp. and RMW Ventures, LLC -- Petition for Declaratory Order,* STB Finance Docket No. 34534 (served Mar. 3, 2004), 2004 WL 395835 (S.T.B.) at *2 ("neither the court cases, nor the Board's precedent, suggest a blanket rule that any eminent domain action against railroad property is impermissible"). Contrary to BSOR's argument, Memorandum of Law at 15, none of the cited cases hold that all exercise of a local government's eminent domain power is "categorically preempted." For example, in *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F.Supp.2d 989, 1005 (D.S.D. 2002), *aff'd on other grounds*, 362 F.3d 512 (8th Cir. 2004), the district court

acknowledged that 49 U.S.C. §10501(b) provides that all state efforts to "regulate railroads" are preempted, but undertook a very fact-specific inquiry into whether, in this situation, "South Dakota's eminent domain statutes regulate[d] the DM & E railroad." In another factual context, however, the U.S. District Court for the District of Columbia rejected a claim that ICCTA preempted an eminent domain proceeding against railroad property. *District of Columbia v. 109,205.5 Square Feet of Land*, 2005 U.S.Dist. Lexis 7990 (D.D.C. 2005). Affirming that "eminent domain presents an important state interest, *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 26-27, 3 L.Ed.2d 1058, 79 S. Ct. 1070 (1959)," *id.* at **15-16, the court declared that "the court's inquiry is whether the District's intended use of the defendant's property would unreasonably interfere with railroad operations." *Id.* at **11. As noted above, BSOR's direct resort to litigation in this case -- without so much as contacting the Village to see if the interests could be reconciled -- prevents an answer to this inquiry.

POINT II

The Village May Subject the Greentree Property, and BSOR's Proposed Operations thereon, to Applicable Laws Without Violating the Dormant Commerce Clause

BSOR argues that it would violate the dormant Commerce Clause for the Village to apply "any laws, ordinances, rules, regulations or other requirements" (including its zoning code and the New York Eminent Domain Procedure Law) (collectively "laws") to the Greentree property, and its proposed operations thereon. Complaint ¶¶ 66-71. To establish a violation of the dormant Commerce Clause, BSOR must prove that application of these laws would either (1) discriminate against interstate commerce; or (2) place a disparate burden on interstate commerce that is clearly excessive in relation to local benefits. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 438 F.3d 150, 156-57 (2d Cir. 2006), *petition for certiorari*

filed, 74 U.S.L.W. 3618 (April 21, 2006) ("United Haulers II"). For the reasons that follow, BSOR falls far short of meeting this standard.

A. The Village would not discriminate against interstate commerce by subjecting the Greentree Property, and BSOR's proposed operations thereon, to applicable laws.

BSOR bears the burden of proving that the Village's actions discriminate against interstate commerce. *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir. 1995). In the context of the dormant Commerce Clause, "discrimination" means protectionism in the form of "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994), or the treatment of "articles of commerce coming from outside the State" differently from local articles of commerce for no "reason, apart from their origin." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

In the present case, there is no local or in-state economic interest benefited at the expense of an out-of-state economic interest. *See generally General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997) ("[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply."). First, the Village itself (for whose benefit the laws that BSOR seeks to except itself operate) is certainly not an "in-state economic interest" that can be improperly benefited at the expense of BSOR. *E.g.*, *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 218 (2d Cir. 2004) ("For dormant Commerce Clause purposes, the relevant 'economic interests,' both in-state and out-of-state, are parties using the stream of commerce, not those of the state itself."); *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 402 (3d Cir. 1987) ("A state's choice

between competing land uses or between alternative environmental protection policies does not implicate the Commerce Clause simply because the alternative chosen may be in the best economic interests of the state so long as the state's choice does not discriminate between in-state and out-of-state competitors.").

Moroever, the entities identified by BSOR as potentially affected by the Village's application of applicable laws (BSOR, Coastal Distribution, LLC, Hanson Aggregates New York, Inc., and Greentree Realty LLC) are *all* New York corporations. *See* Stecich Aff. Ex. 11 (entity information from the NYS Department of State website). BSOR operates a rail line *within* New York, Complaint ¶ 3, and Greentree Realty LLC is a *local* business. Thus, application of the law to the Greentree property is neither designed to, nor will it, benefit an in-state commercial interest at the expense of an out-of-state commercial interest.

Nor would the Village's application of the law to the Greentree property solve a local problem solely at the expense of "articles of commerce coming from outside the State" for no "reason, apart from their origin." *City of Philadelphia*, 437 U.S. at 627. The Greentree property has been identified by the Village for possible condemnation under the New York Eminent Domain Procedure Law, and, as required by that law, the purpose for the condemnation is to satisfy local needs. However, there is no basis for asserting that the Village is targeting only interstate commercial interests or out-of-state goods to solve its local problems. First, any laws applied to the Greentree property, including condemnation, would equally affect all operations conducted there, and all goods shipped from there -- regardless of whether they involve local or interstate companies, and whether the goods involved are being transported in-state or out of state. Additionally, as described *supra* and set forth in Stecich Aff. Ex. 10, the Village has many

reasons to condemn the Greentree property that are *wholly unrelated* to the interstate character of any of the goods that might flow through the Greentree property.

Accordingly, BSOR made no showing that it is likely to meet its burden of proving that any application by the Village of its laws to the Greentree property would constitute *per se* discrimination under the dormant Commerce Clause.

B. The Village would not disparately burden interstate commerce by subjecting the Greentree property, and BSOR's proposed operations thereon, to applicable laws.

To show that non-discriminatory measures violate the dormant Commerce Clause, a plaintiff must first show that they cause "a special, disproportionate injury to interstate commerce . . . ." *Nat'l Elec. Mfr. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001), *cert. denied*, 536 U.S. 905 (2002). The Second Circuit has recognized "three instances in which a non-discriminatory state or local regulation may impose a differential burden on interstate commerce: (1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states." *United Haulers II*, 438 F.3d at 156-57 (citation omitted).

As noted above, the commercial entity that would be most directly affected by, for example, the condemnation is a *local* business -- Greentree Realty LLC, the owner of the property. The application of the law to one property that does not include any part of the main (CSX) through rail line and is wholly within the Village of Croton-on-Hudson does not regulate outside of New York's borders or conflict with the regulations of other states. Thus, none of the categories of activities identified by the Second Circuit as giving rise to a disparate burden is implicated. The absence of a disparate burden is fatal to BSOR's dormant Commerce Clause

claim. *Automated Salvage Transp. v. Wheelabrator Envtl. Sys.*, 155 F.3d 59, 75 (2d Cir. 1998); *see also Freedom Holdings Inc. v. Spitzer*, 357 F.3d at 218.

In the context of transportation, inconsistent state regulations may give rise to a special burden on interstate commerce where they undermine the need for "'national uniformity in the regulations for interstate travel.'" *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527 (1959) (citation omitted). "[S]tate restrictions on interstate transporters" may give rise to a "distinct interstate burden" where "[t]ransporters [would be] forced either to abide by state rules or avoid the state entirely [which] would necessarily . . . impede[ ], if they chose the latter course, . . . their efforts to conduct commerce with the surrounding states because they would be unable to pass through the regulating state." *Nat'l Elec. Mfr. Ass'n*, 272 F.3d at 111-12. Nothing that the Village is doing with respect to the Site has any bearing on these interests.

C. To the extent that there is any disparate burden, it is not clearly excessive in light of the substantial local benefits.

If the plaintiff succeeds in showing that a measure imposes a disparate burden on interstate commerce, then the plaintiff must further show that the disparate burden is "clearly excessive in relation to the putative benefits" of the statute. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The "burden" to be weighed against the putative local benefits is limited to "'the burden[ ] on interstate commerce that exceed[s] the burden[ ] on intrastate commerce,'" *Automated Salvage Transp.*, 155 F.3d at 75 (citations omitted), and courts will not question a legislative body's assessment of the need for a particular measure. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 & 217 (2d Cir. 2003) ("This [Pike] balancing test, however, does not invite courts to second-guess legislatures by estimating the probable costs and benefits of the statute, nor is it within the competency of the courts to do so."). Finally, where, as here, a measure does not

disturb "the right of businesses to compete on an equal footing," or "undu[ly] interfere[ ]" with the ability of other states to exercise their police powers, the Second Circuit has held that "the burden imposed on interstate commerce must be regarded as insubstantial" such that even a "minimal showing of local benefit" will "compel a finding that th[e] burden is not 'clearly excessive' to the benefits that the ordinance[ ] provide[s]." *United Haulers II*, 438 F.3d at 161.

In the present case, there are clear and substantial local benefits. As described in Stecich Aff. Exs. 2 and 3, there is a long record of serious environmental violations involving the Greentree property. Additionally, condemnation would provide a much-needed public works facility, and would also allow more needed commuter parking. The Village has attempted and failed to find other locations for this facility, and has determined that a new public works facility would resolve the inefficiencies of having operations at different locations, prevent problems related to illegal dumping and aesthetic concerns regarding the storage of debris at the current public works facility, and satisfy a long term need for additional space. Stecich Aff. Ex. 10.

Moreover, any burden to interstate commerce that would be created by limiting the use of one property that is situated to obtain service from the main (CSX) through rail line is minimal. Any actions taken by the Village with regard to the Greentree property would not disrupt a necessarily interconnected, "national" route of interstate travel. This is not a case like *CSX Transportation, Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005), in which the Court of Appeals reversed the district court's denial of a motion for preliminary injunction and enjoined a District of Columbia act prohibiting the transport of certain hazardous materials by rail over CSX's main lines through the District of Columbia. The court explained that in "assessing the burden [on interstate commerce], it is appropriate for us to consider the practical and cumulative impact were other States to enact legislation similar to the D.C. Act." *Id.* at 673. The Village has not

passed a general ban on rail or other related facilities -- BSOR challenges *only* the Village's actions with regard to one property, and thus the use of that particular property defines the extent of any disparate burden. As such, the Village's application of its laws to the Greentree property will not give rise to a disparate burden on interstate commerce that is clearly excessive in relation to local benefits. *See United Haulers II, supra.*

POINT III

In the Absence of Any Underlying Constitutional Violation, BSOR Has Not Stated a Claim Under 42 U.S.C. § 1983

BSOR alleges that "enforcement of the New York Eminent Domain Procedure Law or zoning and land use provisions with respect to BSOR's rail transportation operations at the BSOR Croton Yard constitutes a deprivation of BSOR's rights secured by the United States Constitution in violation of 42 U.S.C. § 1983 since the Village Defendants' enforcement imposes an impermissible burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution (the Commerce clause)." Complaint ¶ 73. Section 1983 provides a civil claim for damages against any person who, acting under color of state law, deprives another of a right, privilege or immunity secured by the Constitution. 42 U.S.C. § 1983. Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere. Thus, in order to prevail on its section 1983 claim, BSOR must first show that the Village deprived it of a right secured by the dormant Commerce Clause. *E.g., Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986); *Rand v. Perales*, 737 F.2d 257, 260 (2d Cir.1984). As described above, BSOR has not shown a likelihood of success on the merits of its dormant Commerce Clause claim; absent this showing, BSRI's Section 1983 claim provides no independent basis for the issuance of a preliminary injunction.

Point IV
Plaintiff Will Not Suffer Irreparable Injury if a Preliminary Injunction Is Denied

The above discussion concerns plaintiff's low probability of success on the merits. The other prong in any preliminary injunction motion, of course, is whether plaintiff will suffer irreparable harm. Here, plaintiff can point to no such harm.

As one court has explicitly held in rejecting a claim of ICCTA preemption, where the relevant rail line has not been built, there can be no irreparable harm to plaintiff if an injunction is not issued in its favor. *J.P. Rail, Inc. v. New Jersey Pinelands Commission*, 404 F.Supp.2d 636, 647, 652 (D.N.J. 2005). There is no operation to be shut down. Operation of the line lacks essential authorizations from STB and CSX. And the two-year term of BSOR's lease does not denote an expectation of long-term operations, which is surely a part of "irreparable" injury.

Similarly, another court denying a claim of preemption under ICCTA found that "[c]laims about future contracts are speculative," and "claims of job losses are speculative and so do not rise to the level of irreparable harm." *CFNR Operating Co., Inc. v. City of American Canyon*, 282 F.Supp.2d 1114, 1119 (N.D.Cal. 2003).

An entity that is not yet operating has no goodwill to lose. BSOR cannot claim irreparable injury; the possibility that imagined customers will drop their hypothetical allegiance to nonexistent operation cannot be masqueraded as an "actual and imminent" harm. *See, e.g., Freedom Holdings,* 408 F.3d at 114-15. Even for *active* businesses, courts generally regard prospective losses of goodwill as too speculative to be cognizable absent an additional "clear showing" that the alleged injury is not only concrete and imminent, but also tied to a "wholly unique" and thus irreparable opportunity for the existing business. *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37-38 (2d. Cir. 1995). The fact that BSOR has yet to operate makes any prospective loss of goodwill doubly conjectural and beyond legal recognition.

The speculative nature of BSOR's prospective goodwill claim is not changed by its new business relationship with Coastal. Complaint ¶ 46 alleges that "[i]f the property is condemned, BSOR's relationships with its existing customer will necessarily be terminated, thereby adversely and irreparably affecting BSOR." However, this purported injury pertains to a lone customer for which BSOR has not yet moved a single load. BSOR has not begun to accrue the goodwill it purports to fear losing.

Furthermore, even if some goodwill with Coastal existed and could be lost, losses of goodwill are not inherently irreparable. *Penthouse Intern., Ltd. v. Playboy Enterprises, Inc.*, 392 F.Supp. 257, 261 (S.D.N.Y. 1974). BSOR provides no reason to believe the hypothetical loss it alleges would be beyond repair — that BSOR would be forever prevented from demonstrating its reliability.

Conclusion

Plaintiff's motion for a preliminary injunction should be denied, and the temporary restraining order should be lifted.

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May 23, 2006

Respectfully submitted,

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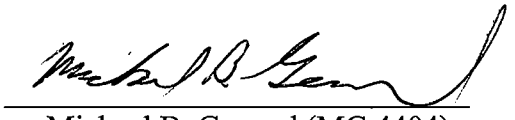
By: 
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